

Rec'd 8 Nov-73

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5 November 1973

STATINTL



Attached is the reply of the Office of General Counsel to your letter to them of 10 September 1973, which you had hand-carried to that Office.

In order to ensure that communications may be a matter of formal record, it is requested that any correspondence you have in the future be addressed to the undersigned at the address given above.

Sincerely yours,

SIGNED



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Attachment

Distribution:

0 - Addressee

1 - OGC,

1 - ROB Soft File

1 - ROB Reader

Signed by:

STATINTL

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OP/RAD/RDB/plc (5 November 1973)

OGC SUBJ: ALLOWANCES  
not indexed

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OGC 73-1990

25 October 1973

MEMORANDUM FOR THE RECORD

SUBJECT : Inclusion of Cost-of-Living Allowance: Separate Maintenance Allowance, in an Employee's Lump-Sum Payment

REFERENCES: A. OGC 73-1805 [REDACTED] to OGC)  
B. OGC 73-1744 (Memo to EA/Support fr OGC, Subj: Foreign Post Differential on Terminal Leave Payment)

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1. This Office received a letter on 10 September 1973 from a June 1973 retiree, [REDACTED] who requested that we review Agency procedures for the computation of terminal pay to persons resigning overseas. [REDACTED] asked that his cost-of-living allowance (separate maintenance) be included in his lump-sum payment for annual leave. He was physically at his foreign post of assignment on the date of his separation and was receiving this allowance.

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2. On 10 May 1973 the Agency adopted a provision of the Federal Personnel Manual (Civil Service Commission) which permits an employee who is separated at his overseas post of assignment and who is authorized a post differential to have the differential included in his lump-sum payment. Although this provision of the Federal Personnel Manual is based upon decisions of the Comptroller General, there was a question as to whether the rule applicable to a differential established under the authority of the Civil Service Commission and paid to an employee at an overseas (non-foreign) post was also applicable to a differential established under the authority of the Secretary of State and paid to an employee

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at an overseas (foreign) post. This question was laid to rest on 28 June 1973 when the Comptroller General decided that "a/though the matter is not entirely free from doubt, we feel that the better view is that an employee separated at a foreign post..." should have the differential for that post included in his lump-sum payment. OGC 73-1744 discusses the 10 May adoption, the Comptroller General decision, and contains notes of a conversation between the writer of the Comptroller General decision and the undersigned.

3. The purpose of this memorandum is to distinguish between differentials and cost-of-living allowances payable in foreign and in non-foreign areas and to indicate which may be included in an employee's lump-sum payment.

4. The Overseas Differentials and Allowances Act (P. L. 86-707, September 6, 1960) established a uniform system for compensating all Government employees in foreign posts irrespective of the agency for which they worked. The Act provided that differentials and allowances may be granted only to an employee stationed in a "foreign area." This Act was codified by P. L. 89-554 (Sept. 6, 1966, 80 Stat. 510) and is found at 5 U. S. C. A. 5922-5925. A "foreign area" is now defined to mean the Trust Territory of the Pacific Islands and any other area outside the United States, the Commonwealth of Puerto Rico, the Canal Zone, and the territories and possessions of the United States. 5 U. S. C. A. 5921(6). The authority to prescribe regulations governing the payment of the foreign differentials and allowances was delegated to the Secretary of State by the President (Executive Order No. 10903, as amended, and Executive Order No. 11137, as amended), and the Secretary of State has promulgated the Standardized Regulations (Government Civilians, Foreign Areas).

5. The United States Code and the Standardized Regulations provide that under certain conditions an employee at a post in a foreign area may receive quarters allowances (temporary lodging and living quarters) (5 U. S. C. A. 5923), cost-of-living allowances (post allowance, supplemental post allowance, foreign transfer allowance, home service transfer allowance, separate maintenance allowance, education allowance, and education travel allowance)

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(5 U.S.C.A. 5924), and a post differential (not to exceed 25 per cent of an employee's rate of base pay) (5 U.S.C.A. 5925). Quarters allowances are intended to reimburse an employee for substantially all costs for quarters when Government-owned or rented quarters are not available. Cost-of-living allowances are intended to reimburse an employee for certain "excess costs" (exclusive of quarters) which result from being stationed at a post in a foreign area. A post differential, on the other hand, is designed to provide "additional compensation" to an employee for service at a post in a foreign area where conditions of environment differ substantially from such conditions in the continental United States and warrant additional compensation as a recruitment and retention incentive. Chapters 112, 212, and 572, Standardized Regulations. The Standardized Regulations also contain provisions for the commencement and termination of the differential and each specific allowance, but the Regulations are silent on the specific details of pay administration, leaving this to the individual agencies.\*

6. The authority to pay certain allowances to an employee stationed at a post in a non-foreign area is found at 5 U.S.C.A. 5941. The genesis of this authority is the Independent Offices Appropriation Act of 1949 (P.L. 491, April 20, 1948, Ch. 219, § 207, 62 Stat. 176, 194) as amended by the Supplemental Independent Offices Act of 1949 (P.L. 862, June 30, 1948, Ch. 775, § 104, 62 Stat. 1196, 1205). In Section 202 of Executive Order No. 10000 of Sept. 16, 1948, the President delegated the authority given him by the Independent Offices Appropriation Act (Section 207, as amended) to the Civil Service Commission. The Commission's Regulations are found at 5 C.F.R. 591 (1973). These Regulations define a non-foreign area to mean Alaska, Hawaii, Puerto Rico, territories and possessions of the United States, "...and such additional areas located outside the continental United States as the Secretary of State shall designate as being within the scope of Part II of Executive Order 10000, as amended." 5 C.F.R. 591.101(f). According to these Regulations, a non-foreign

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\* As also pointed out in OGC 73-1744, a foreign differential is additional pay and is not a reimbursement for expenses incurred, as are the foreign quarters and cost-of-living allowances.

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differential is paid "...at a post in a non-foreign area when conditions of environment differ substantially from conditions of environment in the States and warrant its payment as a recruitment incentive." 5 C.F.R. 591.101(g). A non-foreign allowance is a cost-of-living allowance paid "...at a post in a non-foreign area where living costs are substantially higher than in the District of Columbia." 5 C.F.R. 591.101(e). Under no circumstance, however, may the total amount of the non-foreign allowance and differential exceed 25 per cent of an employee's rate of basic pay. 5 C.F.R. 591.304 and 591.401(b). Furthermore, non-foreign allowances and differentials are not included in the base used in computing overtime pay, night differential, holiday pay, retirement deductions, or any other additional pay, allowance or pay differential. 5 C.F.R. 591.401(d).

7. For the purposes of Title 5 of the United States Code (Government Organization and Employees) an "employee" includes one who is engaged in the performance of a Federal function under authority of law. 5 U.S.C.A. 2105(a)(2). Thus, employees of the Central Intelligence Agency are included within this definition. \*\* Section 5551 of Title 5 provides that an employee (as defined by section 2105) who is separated from service is entitled to receive a lump-sum payment for accumulated and current accrued annual leave to which he is entitled by statute. The lump-sum payment equals the pay the employee would have received had he remained employed until the end of the period of the leave. The lump-sum payment is considered pay for tax purposes only. 5 U.S.C.A. 5551(a).

8. The right to a lump-sum payment vests on the date of separation and must be paid to an employee for his accumulated annual leave, unless the needs of the Government require his retention in an annual leave status. 33 Comp. Gen. 85 (1953). An employee's lump-sum payment includes the premium percentage pay to which he would have been entitled had he remained on the rolls of his agency. 36 Comp. Gen. 18 (1956), 26 Comp. Gen. 102, 105 (1946). An employee separated at (meaning physically at) his overseas post of assignment for which a differential or a cost-

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\*\* Agency employees are not, however, subject to all of the provisions of Title 5; the Agency is specifically exempted from certain parts and/or subparts of this Title.

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of-living allowance is authorized is entitled to have the differential or the allowance included in his lump-sum payment. 32 Comp. Gen. 323 (1953). If an employee is separated after he leaves his overseas post, even if he is on leave at another overseas post on the date of his separation, he is not entitled to have either the differential or the cost-of-living allowance included in his lump-sum payment. OGC 73-1744, 38 Comp. Gen. 594 (1959), 33 Comp. Gen. 287 (1954). The Comptroller General has established the rule that a cost-of-living allowance or a post differential paid under the authority of section 207 of the Independent Offices Appropriation Act of 1949 and Parts I and II of Executive Order No. 10000 is to be included in the lump-sum leave payments of an employee separated at his overseas post. 52 Comp. Gen. — (B-178428, June 28, 1973), 32 id. 323 (1953), 29 id. 10 (1949). Cost-of-living allowances paid at foreign posts under the authority of section 204 of the Supplemental Independent Offices Appropriation Act of 1949 are not included in a lump-sum payment. 52 Comp. Gen. — (B-178428, June 28, 1973), 28 Comp. Gen. 465 (1949).

9. Under section 207 of the 1949 Act, funds used to pay salaries and compensation to persons stationed outside the continental U.S. or in Alaska could be used for the payment of "additional compensation" based on living costs substantially higher than those in the District of Columbia, or on conditions of environment which differ substantially from conditions in the United States and warrant additional compensation as a recruitment incentive (or on both such factors). No "additional compensation" based on living costs substantially higher than those in the District of Columbia could be paid under this section to persons receiving a cost-of-living allowance under section 204 of the 1949 Act or under section 901(2) of the Foreign Service Act of 1946. Furthermore, the "additional compensation" paid under section 207 could not exceed 25 per cent of the rate of an employee's basic pay.

10. Under section 204 of the 1949 Act, funds used to pay the expenses of travel or the expenses of the activities of the department or independent agency concerned could also be used to pay living quarters allowances and cost-of-living allowances, similar to those allowed by section 901(2) of the Foreign Service Act of 1946, for all civilian employees of the Government stationed at a post in a foreign


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area. Section 901(2) of the Foreign Service Act of 1946 (found at 60 Stat. 1026), allows the Secretary of State to grant cost-of-living allowances to an employee stationed at a post in a foreign area when such allowances are necessary to enable an employee to carry on his work efficiently, to enable an employee to meet the extra-ordinary and necessary expenses not otherwise compensated for which are incurred incident to the establishment of a residence at the post, and to assist an employee to meet the expenses of maintaining his family elsewhere than at the post of assignment.

11. In summary, it is noted that foreign post differentials, non-foreign post differentials, and non-foreign cost-of-living allowances are to be included in the lump-sum payment of an employee who resigns at the foreign or at the non-foreign post. A non-foreign post cost-of-living allowance paid pursuant to section 207 actually is denominated as "additional compensation," and is included in the lump-sum payment. 28 Comp. Gen. 465, 467 (1949). All cost-of-living allowances (and living quarters allowances) paid to employees at foreign posts (including the separate maintenance allowance) are paid pursuant to section 204 or section 901(2) and are not to be included in the lump-sum payment because they are intended to reimburse an employee for costs which result from his being stationed at a foreign post and are not in the nature of "additional compensation."

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Office of General Counsel

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1 - AEG Signer

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10 Sept. 1973



Central Intelligence Agency  
Attention: Office of the General Counsel  
Washington, 25, D.C.

Gentlemen:

I have been informed by personal and telephonic conversation with Members of the Office of Finance of the Agency that the computation of my terminal payment will not include the provision of the Cost of Living Allowance: Separate Maintenance Allowance, as provided for in the Federal Personnel Manual Supplement 990-2, Section S2-3,f. I request that you review the Agency procedures on the computation of terminal pay to persons resigning overseas in order that my lump sum payment may be correctly computed.

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This is in response to your letter of 10 September which asked us to review our procedures on the computation of terminal pay to persons resigning overseas.

We have conducted a thorough review of this matter and have determined that you are not entitled to have your separate maintenance allowance, or for that matter, any of the other cost-of-living allowances you may have been receiving on the date of your separation, included in your lump-sum payment.

In your letter you refer to the Federal Personnel Manual Supplement 990-2, Book 550, Subchapter S2-3, f, as authority for your contention that you are entitled to have the separate maintenance allowance included in your lump-sum payment. The applicable portion of this subchapter states that "a/n employee who is separated at his overseas post of assignment for which a differential or a cost-of-living allowance is authorized is entitled to have the differential or the allowance included in his lump-sum payment." The cost-of-living allowance referred to in this statement is that payable under the authority of section 5941 of Title 5 of the United States Code and not the numerous cost-of-living allowances payable under the authority of the Overseas Differentials and Allowances Act (now found at section 5924 of Title 5 of the United States Code).

Section 5941 is administered by the Civil Service Commission and the Commission's regulations governing these payments are found in the Code of Federal Regulations. The allowances which may be granted under this section are called the non-foreign cost-of-living allowance and the non-foreign differential. They may be granted only to employees serving in non-foreign areas (Alaska, Hawaii, Puerto Rico, and the territories and possessions of the United States). The Overseas Differentials and Allowances Act is administered by the Secretary of State, and the regulations governing these payments are found in the Standardized Regulations (Government Civilians, Foreign Areas). The allowances and differentials which may be granted under these Regulations may be granted only to employees serving in foreign areas (Trust Territory of the Pacific Islands, and any other area outside the United States, Puerto Rico, Canal Zone, and the territories and possessions of the United States).

The Comptroller General of the United States has several times held that the inclusion of a cost-of-living allowance or a differential in a lump-sum payment is dependent upon the allowance or differential being additional pay and not in the nature of a reimbursement for expenses incurred. The Comptroller General has also held that differentials, both "foreign" and "non-foreign" and a "non-foreign" cost-of-living allowance are to be included in the lump-sum payments of employees separated at their posts. A "non-foreign" post cost-of-living allowance actually is denominated as "additional compensation." Cost-of-living allowances paid to employees at foreign posts are not included in lump-sum payments because they are intended to reimburse an employee for costs which result from his being stationed at a foreign post and are not "additional compensatio

We are sorry we could not rule favorably in your behalf. If you have any further questions on this matter, please feel free to contact us.